United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

orig
w/affidavit

74-1513

To be argued by
PETER C. SALERNO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1513

STEVEN F. BROWN,

Plaintiff-Appellant,

—v.—

MAJOR GENERAL WILLIAM KNOWLTON, Superintendent, United States Military Academy, BRIGADIER GENERAL SAMUEL WALKER, Commandant, United States Military Academy, and ROBERT F. FROEHLKE, Secretary of the Army,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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BRIEF FOR DEFENDANTS-APPELLEES

Issue Presented for Review

Was the District Court correct in its determination that the procedure involved in appellant's separation from the United States Military Academy at West Point afforded him due process of law as guaranteed by the Fifth Amendment to the United States Constitution?

Statement of the Case

The Proceedings Below

Plaintiff-appellant Steven F. Brown (hereinafter "Brown") brought an action in District Court seeking a declaratory judgment that the procedure by which he was

separated from the United States Military Academy denied him due process of law as guaranteed by the Fifth Amendment. Brown requested an injunction ordering the defendants, the Secretary of the Army, Robert F. Froehlke, the Superintendent of the Academy, Major General William Knowlton, and the Academy Commandant, Brigadier General Samuel Walker, to grant him a Bachelor of Science degree and a commission. Plaintiff and defendants each moved for summary judgment, and U.S. District Judge Robert J. Ward granted judgment for defendants, on the grounds that Brown had been afforded due process by the Army. *Brown* v. *Knowlton*, 370 F. Supp. 1119 (S.D.N.Y. 1974).

Statement of Facts

In the spring of 1972 plaintiff-appellant Steven F. Brown was a First-Classman at the United States Military Academy at West Point, scheduled to graduate in June. During his final semester at the Academy, however, he began to have difficulties that resulted in his being repeatedly cited for violations of the Academy disciplinary system. Such violations are penalized by demerits, which are awarded in varying amounts depending on the severity of the offense. Each cadet is allowed a certain number of demerits per month; if he accumulates a number that exceeds his total allowance for any semester his case is referred to the Academy's Academic Board for action that can include a recommendation that the cadet be separated from the Academy.

Brown was notified late in February that he was not measuring up to Academy standards of attitude and discipline, and, on March 1, 1972, his Tactical Officer sent a letter to his parents alerting them to the situation. On March 18, while he was supposedly confined to his room as punishment for a violation of regulations, Brown left the Academy in his car, accompanied by three other cadets.

After a visit to a nearby bar where alcohol was consumed, Brown was involved in a one-car accident in which his car ran off the road and overturned. As a result of that episode, a Commandant's Board recommended that Brown be separated from the Academy; subsequently, however, a Board of Officers recommended that Brown should not be separated, but should instead be required to repeat his fourth year at the Academy.

Brown's discipline problems continued to worsen during the late spring, and by the end of the semester he had accumulated 158 demerits, well above his semester allowance of 102.* The Academic Board then considered his case, including his conduct, leadership ability, and failing grade in English, and determined that he was deficient in conduct and should be separated. On June 21, 1972, Brown was separated from the Academy and discharged from the Army.

Arguing that his Fifth Amendment right to due process had been denied, Brown brought an action in the District Court seeking declaratory and injunctive relief, including reinstatement to the Academy. The District Court granted a preliminary injunction ordering his reinstatement, and, in the fall of 1972, Brown began to repeat his final year.

That fall, this Court decided *Hagopian* v. *Knowlton*, 470 F.2d 201 (2d Cir. 1972), in which it set forth the due process requirements to be applied to the separation of cadets from the Military Academy on conduct-

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* Brown received no demerits for the March 18 episode; according to Brown's testimony at the second Academic Board proceeding, another cadet involved in that incident, who was only a passenger in Brown's car, received "either 55 or 70 demerits" for the same incident, an amount that would have raised Brown's total over the 200 mark, or about double the allowable maximum (A-185). ("A" refers to the appendix, followed by the page number citation therein).

deficiency grounds. Following that decision, on December 21 and 22, 1972, and January 9, 1973, the Academic Board conducted a second proceeding on the Brown case, a hearing aimed at satisfying the *Hagopian* requirements. Brown was fully apprised in detail of the charges against him, he was permitted counsel to assist him in the preparation of his case, he was permitted to appear at the hearing, to cross-examine witnesses, and to call witnesses to support his position. At the conclusion of that hearing the Board removed 40 of Brown's 158 demerits, leaving him still 16 over the limit, and determined that his potential did not warrant retention at the Academy. The Board again recommended that Brown be separated. This recommendation was approved by the Secretary of the Army. Brown was not graduated from the Academy and received neither a degree nor a commission. No action has been taken on his separation and discharge, pending the result of this litigation.

After the second Academic Board decision was announced, Brown filed an amended complaint, attacking the second proceeding on due process grounds. Each side moved for summary judgment and the District Court ruled in favor of the defendants-appellees, holding that the second Academic Board proceeding had afforded Brown due process of law and was in full compliance with the requirements of the *Hagopian* case.

Regulation Involved

Regulations for the United States Military Academy § 11.02 Graduation and Conferring of Degree

(a) A cadet of the First Class who has been found by the Academic Board to have successfully completed all courses of instruction, including academic, military, and physical education and training, and to have maintained

the standards of conduct and to possess the moral qualities and traits of character and military aptitude essential for a graduated cadet, shall receive a diploma signed by the Superintendent, the Commandant of Cadets, and the Dean of the Academic Board, and shall thereupon become a graduate of the United States Military Academy with the degree of bachelor of science.

ARGUMENT

POINT I

The procedure by which Brown was separated from the Military Academy complied with all applicable due process requirements.

The procedure by which a cadet is judged to be deficient in conduct and separated from the Military Academy was recently considered by this Court in *Hagopian* v. *Knowlton*, 470 F.2d 201 (2d Cir. 1972). The procedures there challenged were the same procedures under attack initially in this case.

In *Hagopian* this Court emphasized that the rigorous standards of discipline, behavior and decorum imposed on cadets are "vital elements of a training program designed to develop the mind, body and character of prospective career officers." 470 F.2d at 204. Such standards, the court said, "should not be interfered with by the judiciary." *Id.* at 204. The court found, however, that there was one important element missing from the separation procedures—a fair hearing at which the cadet is able to appear and present a defense to the charges against him. The court then specified the elements that would characterize such a fair hearing: The hearing may be procedurally informal, but the cadet must be apprised of the charges against him, and must be allowed to appear and present a defense, in-

cluding evidence and witnesses, on his behalf. The cadet need not be afforded counsel at the hearing itself, but he must be allowed to have the aid of counsel in preparing his defense. The court concluded:

> The foregoing is intended merely to convey, for the guidance of the Academy, the rudiments of due process required for disciplinary proceedings. It will be for the Academy within this rough framework to determine the precise procedures to be employed. 470 F.2d at 212.

At the time of the *Hagopian* decision two other cadets, Brown (the plaintiff-appellant herein) and Jaremko, were also challenging the Academy's separation procedures in the courts. In the wake of that decision all three cadets were afforded hearings aimed at satisfying the *Hagopian* standards. As a result of those hearings, Hagopian and Jaremko were reinstated, but Brown was again found to be deficient in conduct, and separation was again recommended.

Brown's hearing before the Academy's Academic Board took place on December 21 and 22, 1972, and on January 9, 1973. The Board had two functions: First to determine whether in fact Brown had accumulated a total of demerits over the allowable maximum during the period in question, and second, if the answer to that question were yes, to determine whether Brown's potential warranted retaining him at the Academy despite his conduct deficiency. Brown had been notified of the hearing about one month in advance, and he had had counsel made available to him to assist in the preparation of his defense. The Academy had also made available to him prior to the hearing copies of each delinquency report (2-1 form) relating to the offenses with which he was charged. (These reports had been signed by Brown at the time of each offense.) Brown was permitted to appear before the Board, and to call witnesses to testify for him, both for the purpose of contesting each award of demerits and in order to establish his potential

for retention at the Academy. Brown was also allowed to cross-examine other witnesses called by the Board. In addition, both the officers named in Brown's litigation as well as the *only* officer that was challenged by Brown did *not* participate in the Board's hearing.

Thus, Brown was afforded a fair hearing explicitly modeled on, and complying with all the requirements of, the decision in *Hagopian*. His separation from the Academy, therefore, did not violate his right to due process of law as guaranteed by the Fifth Amendment.

POINT II

Brown's contention that his separation was the result of harassment or bad faith is completely unsupported by and contrary to the evidence.

This is an appeal from a summary judgment where both parties cross-moved for summary judgment, reflecting their agreement that there were no genuine issues of material fact. Rule 56, Fed. R. Civ. P. What is unusual in this appeal, however, is the characterization, raised now for the first time, that has been attached to the undisputed facts. The plaintiff-appellant would like this Court to view the facts as follows: Brown, a model cadet for the first 3½ years of his West Point career, was involved in one unfortunate incident midway during his last semester (the automobile crash) and thereafter became the victim of a concerted effort designed to remove him from the Academy, an effort that culminated in a hearing before a biased Academic Board which, although in form complying with the *Hagopian* requirements, was in fact a sham and a complete denial of Brown's Fifth Amendment right to due process. However, no evidence has been offered to support his claim of bad faith and harassment, and no explanation of the suggested improper motive has been made, except that

Brown's troubles began with the automobile accident in March of 1972. Appellant's Brief at 16. See also *Id.* at pp. 17-18, 19-20.

The record shows quite a different story. It shows that Brown was found deficient in leadership aptitude and attitude and "conditioned" in January, 1971, and again in May, 1971, during his third year at the Academy. This means that for varying periods he received extra training and attention because of his difficulty in measuring up to Academy standards. The second "conditioned" status was lifted in December, 1971, by Brown's Tactical Officer. At that time the Tactical Officer noted that if Brown showed no improvement he intended to recommend that the cadet be separated as deficient in aptitude. During January and February, 1972, Brown received sufficient demerits from violations of the disciplinary system to prompt a conference with the Colonel in charge of his unit, who told him that he was not measuring up to the standards of attitude and discipline required at the Academy. At that time, on March 1, 1972, a letter was sent to Brown's parents, advising them of his poor performance. Despite the fact that he realized he was under close scrutiny, and while supposedly confined to his room as punishment for a disciplinary violation, Brown broke his restriction by going AWOL from the Academy, and, after some drinking in the nearby town of Highland Falls, was involved in an automobile accident in which his car left the highway and overturned (A. 183-84). After a hearing on this incident, a Commandant's Board recommended that Brown be separated from the Academy; he was then offered the option of resigning or of requesting a hearing before a Board of Officers. Brown chose the latter, and, after a hearing late in April at which he was represented by counsel appointed by the Academy (A. 38), the Officers Board recommended that he repeat his final year. Meanwhile Brown was cited by three Commandant's Boards for major disciplinary violations: Failure to comply with a written order; extremely

poor judgment in the preparation of an English paper; and gross lack of judgment for cutting eleven English classes without authority. Late in April Brown's Tactical Officer recommended he be separated because of a deficiency in aptitude for leadership; during May this recommendation was considered by two levels of appeals boards each of which concurred. Late in May the Department of English decided that despite the fact that Brown had passed his English final examination he should receive a failing grade because of his repeated absences from class.* This failure alone could have been sufficient grounds for separation.

Thus, far from a coordinated effort to harass Cadet Brown, what the record shows is a cadet who found it impossible to measure up to standards of conduct, leadership aptitude or academics. All of these deficiencies were considered by the Academic Board at a meeting on June 3, 1972. That board found Brown to be deficient in conduct, having accumulated 158 demerits for the semester, and, considering all the facts, lacking in the potential that would warrant retention at the Academy.

Later, the Academic Board reached the same conclusion after a hearing that afforded Brown all the procedural due process mandated by the *Hagopian* decision.

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* The fact that Brown failed English because of poor attendance, rather than poor performance on his examination, makes appellant's suggestion that Brown should have been allowed to retake his examination, (Appellant's brief at 2) seem specious.

POINT III

Appellant's contention that the Academic Board hearing was untimely is without merit.

In *Hagopian,* this Court noted that a hearing held to consider a conduct deficiency measured by one semester would afford due process because, among other things:

> Since the demerit period roughly coincides with the relatively short duration of a college semester, the opportunity to appear and contest the factual basis of demerits previously awarded without a hearing would not be lost to the memory of either the cadet or available witnesses. 470 F.2d at 211.

Nowhere in the opinion, contrary to appellant's contention, is there a *requirement* that a hearing, to be "timely", must be held within that period. Even if the decision could be read to impose such a limit, however, it should not be held to apply in this case. Here, the appellant was notified on May 30, 1972, or before the end of the semester in question, that he was deficient in conduct. At that time he was shown a list of the demerits he had been awarded (each of which had been acknowledged in writing by him) and asked if they were just and correct. He chose to contest some of the demerits and certainly had an opportunity to contest any that he believed to be erroneous. At his Academic Board hearing, Brown stated that at the time of the review on May 30 he had a "fair idea" of what the offenses involved (A. 134). In addition, plaintiff filed his first complaint in this case in the District Court on July 25, 1972. He was seeking, among other things, a hearing on the demerit awards, and should have preserved his own recollection and the proposed testimony of his witnesses in anticipation of obtaining the hearing requested (A. 23). Plaintiff should not be able to assert his own lack of diligence as a denial of due process, when the Army made arrangements for a hearing soon after the *Hagopian* decision. (The

decision was announced on October 31, the hearing was authorized by the Army on November 24, and began December 21, 1972.) Additionally, in the words of the court below:

> It is clear from the record before the Court that plaintiff's lack of memory of the demerits as to which he raises this argument occurred prior to the first [Academic Board] hearing, "during the relatively short duration of a college semester" (A. 13).

Thus there is no showing of actual prejudice resulting from the time lapse between the first Academic Board proceeding and the second one. Cf. *Barker* v. *Wingo*, 407 U.S. 514 (1972) (criticizing the application of fixed or arbitrary time standards in criminal cases absent a showing of serious prejudice).

POINT IV

The written reports of violations and demerit awards, signed by appellant, were sufficient evidence to sustain the demerits.

Appellant argues that the reports of demerit awards, signed by him, should have no value as evidence of misconduct in a subsequent separation hearing before the Academic Board. What he apparently contends is that in such a separation hearing, the Academy should be required to prove, by the testimony of witnesses to the alleged offenses, the validity of every demerit award made during the semester, or at least of every demerit award contested by the cadet. Such a contention finds no support in *Hagopian,* and, if adopted, would undermine and overburden the Academy's disciplinary system.

Under the current system, demerit awards for minor violations (Class III) may be prompted by Academy personnel, or by the cadets themselves. When an allegation is made, the accused cadet is contacted by his Tactical Offi-

cer and given a chance to contest the award of demerits. If he does not contest the award, the cadet signs a (2-1) report form which contains his admission of the correctness of the report. If the demerit limit is exceeded for a semester, the cadet is notified, shown a list of the violations, and given another chance to contest the awards. In the instant case, Brown signed each 2-1 form and received such notification (A. 134). Under the current system, the cadet is then given a hearing before the Academic Board where he is able to call any witnesses he feels will be able to present his side of the story. The Academic Board then may remove any demerits it feels have been successfully contested by the cadet and, if the cadet is still over the limit, the Board must then decide whether the cadet has the potential to warrant retention at the Academy.

This is a procedure that was approved by this court in *Hagopian*. In that decision, the court cited *Wasson* v. *Trowbridge,* 382 F.2d 807 (2d Cir. 1967), for the proposition that a cadet must be given "an adequate opportunity to present his defense . . ." 470 F.2d at 210. And in *Hagopian,* the court spoke only of an "opportunity to appear and *contest* the factual basis of demerits previously awarded . . ." Id. at 211 (emphasis added). No mention is made of any requirement to prove or prosecute formally the offenses cited. In fact, in both *Wasson* and *Hagopian* the very clear emphasis is on the allowable informality of the procedure and the fact that it need not be adversarial. Clearly also, the burden of proof is on the cadet to contest the demerits which he has already accepted. When he appears at the hearing, the emphasis is not on any "presumption of innocence" (appellant's brief at 23), which normally attends a criminal trial, but is on affording the cadet, within the informal procedure, an opportunity to "present a defense", as that term has been defined in *Wasson* and *Hagopian.*

Appellant also argues that the records of demerits could not be used to sustain the demerits because they were "hearsay." Appellant's Brief at 6. He apparently misinterprets the opinion of the court below on this point. Judge Ward did not say, as alleged in appellant's brief at p. 6, that such records are admissible "as an exception to the hearsay rule." What Judge Ward did say was:

> The Court also concludes that the so-called presumption of correctness accorded to delinquency reports does not violate due process so long as the cadet charged is given an opportunity at some point to rebut the charges.
>
> *This is analogous to* the business records exception to the hearsay rule which permits records kept in the regular course of business to be admitted into evidence for the purpose of proving the truth of the matter asserted therein. Such records are admissible without the testimony of the person who has knowledge of the facts recorded. In like fashion, delinquency reports are admissible for the purpose of establishing the truth of the statements they contain, and due process is not violated so long as the cadet is given the opportunity to show that the reports lack trustworthiness or are in fact erroneous (A-11) (emphasis added).

The rigorous standards of the hearsay rule attend formal trials; they are out of place at an informal administrative hearing such as the one being considered in this case. *Cf. Richardson* v. *Perales,* 402 U.S. 389, 402 (1971).

In any event, the delinquency reports in question are an integral part of the overall disciplinary system at the Academy applicable to every cadet involved in an infraction of the regulations, and, as far as the "business" of the Academy is concerned, are "records kept in the regular

course of business." The fact that each report of demerits bears the signature of Brown would also seem to constitute an admission within the recognized exception to the hearsay rule.

POINT V

Appellant's other contentions regarding alleged denial of due process are similarly without merit.

The informality of the hearing similarly militates against appellant's claim that he was unfairly denied the opportunity to cross-examine the officers who had awarded the demerits. Appellant's brief at 6. Moreover, Brown had the right to call any officers he wished as witnesses, including the officers who had awarded him demerits.

Appellant also contends that he was denied due process in that "at no time was the required evaluation of appellant's military potential by the Commandant made." This ignores the fact that the Commandant of the Academy at the time of the hearing, Brigadier General Philip R. Feir, was a member of the Academic Board that made the determination of Brown's potential for retention (A-125).

Appellant's allegation that the wrong officer awarded many of Brown's demerits is unsubstantiated by any facts in the record. The record shows that when Brown was transferred to the direct control of the Regimental S-1 Officer, it was that officer who awarded the demerits in question, even though he signed the awards in the spaces provided for the Tactical Officer. The further allegation that the wrong officer prepared Brown's Delinquency Record appears to be meaningless, if technically correct, since it has little relevance to any asserted denial of due process. The Record was merely a list of Brown's violations prepared for administrative convenience; it seems unlikely that the S-1 Officer's delegating the duty

of typing the list to a secretary, or to the Tactical Officer as occurred here, rises to the level of a due process violation. There has been no challenge to the Record's accuracy.

Appellant contends that he was denied due process because he was not allowed to look at the confidential evaluations contained in his Academy file. This contention is answered by *Hagopian,* where the court cited with approval the conclusion in *Wasson* that " '[p]articularly on the question of [his] fitness to remain a Cadet, he is not entitled to see the confidential opinions of members of the faculty', 382 F.2d at 813." 470 F.2d at 212.

Finally, appellant argues that ". . . the peculiar circumstances of appellant's case made a *de novo* hearing by the court below essential to a determination of whether or not appellant did indeed receive a fair hearing." Appellant's brief at 20-21. This is a curious assertion from appellant in light of the fact that he filed for summary judgment in the court below, never requesting such relief. No such hearing has ever been required in cases of this type and it should not be imposed here.

POINT VI

Appellant has not satisfied the requirements for a Bachelor of Science degree and there is no jurisdiction to order the granting to appellant of a commission in the United States Army.

Appellant also argues that the defendants abused their discretion in denying him a Bachelor of Science degree, as distinct from their decision denying him a commission as an Army officer. To this assertion it need only be said that under Academy regulation § 11.02(a) a cadet must meet standards of conduct, character and aptitude, as well as academic requirements, in order to qualify for an Academy

degree. Clearly Brown has not met all of these requirements. The Academy has offered, and continues to offer, a certificate stating that Brown has successfully completed his academic courses at the Academy. Since he has not met the additional requirements for a degree, none should be awarded.

Additionally, under the Supreme Court's holding in *Orloff* v. *Willoughby*, 345 U.S. 83, 90 (1953), it is clear that there is no jurisdiction to order the Secretary of the Army to grant appellant a commission in the United States Army.

CONCLUSION

In light of the foregoing, it is respectfully submitted that the decision of the District Court should be affirmed.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 19th day of July 1974 she served 2 copies of the within

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by placing the same in a properly postpaid franked envelope addressed:

Joan Goldberg, Esq.,
Kunstler, Kunstler, Hyman & Goldberg,
370 Lexington Ave.
New York, NY 10017

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

19th day of July 19 74

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975